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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1169~~ 84

OBED M. LASSEN, COMMISSIONER,
STATE LAND DEPARTMENT,
Petitioner,

v.

THE STATE OF ARIZONA, EX REL.
ARIZONA HIGHWAY DEPARTMENT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF OF THE STATES OF MONTANA, NEBRASKA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, SOUTH DAKOTA, UTAH, WYOMING AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

FORREST H. ANDERSON
Attorney General of
The State of Montana
Helena, Montana

CLARENCE A. H. MEYER
Attorney General of
The State of Nebraska
Lincoln, Nebraska

CHARLES NESBITT
Attorney General of
The State of Oklahoma
Oklahoma City, Oklahoma

PHIL L. HANSEN
Attorney General of
The State of Utah
Salt Lake City, Utah

BOSTON E. WITT,
Attorney General of
The State of New Mexico
Santa Fe, New Mexico

HELGI JOHANNESON
Attorney General of
The State of North Dakota
Bismarck, North Dakota

FRANK FARRAR
Attorney General of
The State of South Dakota
Pierre, South Dakota

JOHN F. RAPER
Attorney General of
The State of Wyoming
Cheyenne, Wyoming

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The States of Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming, through their Attorneys General, respectfully submit this joint brief as amici curiae under Rule 42(4) Rules of the Supreme Court, in support of the Petition for a Writ of Certiorari to the Arizona Supreme Court filed by Obed M. Lassen, Commissioner, State Land Department of the State of Arizona.

REASONS FOR GRANTING THE WRIT

ARGUMENT

I. THE CASE PRESENTS A QUESTION OF SUBSTANTIAL IMPORTANCE AFFECTING THE ADMINISTRATION BY THE STATES OF "TRUST LANDS" GRANTED TO THEM BY THE UNITED STATES UNDER THEIR ENABLING ACTS.

The States who are parties to this amici curiae brief did by their statehood Enabling Acts receive grants of land from the United States.[1] These lands were granted to the respective States for the benefit of public schools and for certain other governmental institutions and functions. By these Enabling Acts Congress prescribed rules for the administration and disposal of such lands. Simply stated, the lands were granted to the States under an express trust for the support of common schools (and other specific institutions and functions) without the right or power of the States to use, dispose of, or alienate the lands except in the manner set forth in the Enabling Acts. Each of these States, by their constitutions, accepted these lands and by such acceptance contracted with the United States that they would administer the lands in accordance with the dictates of the Enabling Acts.

Pursuant to the Enabling Acts, the States, by their constitution and statutes, have set up rules for administration of the lands. Problems have arisen in most of these States regarding the use to which the trust

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[1] Montana, Act Feb. 22, 1889 (25 Stat. 676)
Nebraska, Act April 19, 1864 (13 Stat. 49)
New Mexico, Act June 20, 1910 (36 Stat. 557)
North Dakota, Act Feb. 22, 1889 (25 Stat. 676)
Oklahoma, Act June 16, 1906 (34 Stat. 267)
South Dakota, Act Feb. 22, 1889 (25 Stat. 676)
Utah, Act July 16, 1894 (28 Stat. 107)
Wyoming, Act July 10, 1890 (26 Stat. 223)

lands and the proceeds obtained therefrom could be placed. These problems, however, have been resolved in compliance with the clear mandate of the Acts of Congress.

The decision of the Arizona Supreme Court in *Lassen v. State of Arizona*,.....Ariz.,....., 407, P. 2d 747, (1965) ignores the trust provisions prescribed by Congress in the Arizona-New Mexico Enabling Act. This decision, if followed in other States, would do violence to the provisions of the Enabling Acts and to the intent and purpose expressly manifest by Congress when the "trust lands" were granted. This case completely ignores the language of the Enabling Act of Arizona and New Mexico[2] as well as case law which is well established in the States represented on this brief. The following decisions from States other than Arizona are in conflict with the decision in the court below:

(a) This decision conflicts with the principles and is by name a direct rejection of *State* v. *Walker*, 61 N. Mex. 374, 301 P. 2d 317 (1956). In this case the identical question which was presented in the *Lassen* case under the identical Enabling Act was presented for decision and the New Mexico Supreme Court held that the New Mexico State Highway Commission was required to compensate the trust fund for rights-of-way and construction material that was taken. (See also *State v. Mecham*, 56 N.M. 762, 250 P. 2d 897)

(b) The decision conflicts with the principles of *State* v. *District Court*, 42 Mont. 105, 112 Pac. 706 (1910). This case, following the restrictive language of the Montana Enabling Act, held that

[2] 36 Stat. 557, 568-579.

trust lands could not be condemned for dam and reservoir purposes.

(c) In the case of *State ex rel. Ebke* v. *Board of Educational Lands and Funds of Nebraska,* et al, 159 Neb. 79, 65 N.W. 2d 392 (1954) the Nebraska Court refused to allow a litigant dealing with State-leased land to receive attorneys' fees out of the trust fund. The Court held that the State is required to administer trust lands in accordance with the Enabling Act and Constitution and may not dispose of or alienate the lands or any part thereof except in compliance therewith. (See also, *State* v. *Platte Valley Public Power and Irrigation District,* 143 Neb. 661, 10 N.W. 2d 631 and *State* v. *Central Nebraska Public Power and Irrigation District,* 143 Neb. 158, 8 N.W. 2d 841)

(d) Although the recent Arizona case seems to be in accord with *Ross* v. *Trustees of University of Wyoming,* 30 Wyo. 433, 222 Pac. 3, *on rehearing,* 31 Wyo. 464, 228 Pac. 642 (1924) that case has been strictly construed as applying only to the granting of rights-of-way to counties under the authority of a statute.[3] During the past three years the Wyoming State Board of Land Commissioner has required the Wyoming State Highway Department to pay to it the value of trust lands taken for both state and interstate highway purposes, such money to be credited to the appropriate permanent trust land funds. This procedure has not been challenged in the Courts of Wyoming.

(e) The decision in the Arizona Supreme Court further conflicts with the analogous decisions in *State Highway Commissioner* v. *State* 70 N.D. 673, 297 N.W. 194 (1941) and *United States* v. *Fenton* (D.C. Idaho) 27 F. Supp. 816.

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[3] Section 36-204, Wyoming Statutes, 1957

II. THE DECISION BELOW IS CLEARLY WRONG.

The decision below fails even to refer to this Court's decision in *Ervien* v. *United States,* 251 U.S. 41, 40 Sup. Ct. 75, 64 L.Ed. 128 (1919). As indicated above, the State of New Mexico, at statehood, received a grant of land in trust for the benefit of schools and for certain other governmental institutions and functions. Shortly thereafter, the legislature of New Mexico passed an act authorizing the expenditure of funds derived from the sale of Enabling Act lands for advertising of the resources and advantages of the state of New Mexico. An action was brought under the New Mexico Enabling Act—an act which is identical to the Arizona Enabling Act—to enjoin such expenditures on the ground that the revenues obtained from the trust lands could be used only for the specific purposes enumerated by Congress in the Enabling Act. This Court reviewed the "advantage or benefit theory" which was adopted by the Supreme Court of Arizona in the instant case and rejected it. The Circuit Court Opinion which was approved by this Court is reported at 246 Fed. 277 (8th Circuit 1917). The Circuit Court stated that

> "It would be a step further to allow the advantage that would accrue to the trust from the physical construction of some of the attractive resources of the State that are to be advertised, *such as systems of public highways,* irrigation, public schools, and the like." (emphasis supplied)

By the Decision handed down by the Arizona Supreme Court, Arizona has now taken the very step which this Court struck down in the *Ervien* case. The Arizona Supreme Court in its decision has not so much as men-

tioned the *Ervien* case, although it was repeatedly urged that the Court take note of that decision.

III. IT IS PROPER TO REVIEW THE DECISION OF THE COURT BELOW.

This case was decided by the court below on an original writ of prohibition, a procedure common in Arizona. See, e.g., Ariz. Const. Art. 6, § 4; *Dean v. Superior Court,* 84 Ariz. 104, 324 P.2d 764 (1958); *Beach v. Superior Court,* 64 Ariz. 375, 173 P.2d 79 (1946); *Loftus v. Russell,* 69 Ariz. 245, 212 P.2d 91 (1950). The question arises as to whether the rule of *Rescue Army v. Municipal Court,* 331 U.S. 549, 67 Sup. Ct. 1409, 91 L.Ed. 1666 (1947), bears on the petition for certiorari.

The answer is No. *Rescue Army* held that this Court would not exercise the jurisdiction it undoubtedly had and determine *constitutional* issues presented by a writ of prohibition. The refusal was grounded upon "a policy of strict necessity in disposing of *constitutional* issues." (Emphasis added.) 331 U.S. at 568. The Court further stated:

> "One aspect of the policy's application, it has been noted, has been by virtue of the presence of other grounds for decision. But when such alternatives are absent, as in this case, the application must rest upon considerations relative to the manner in which the *constitutional* issue itself is shaped and presented." 331 U.S. at 573. (Emphasis added.)

Where the issue is non-constitutional, this Court has had no problem in determining cases which come to it without a full record. See, e.g., *Seaboard Line R. Co. v. Daniel,* 333 U.S. 118, 68 Sup. Ct. 426, 92 L.Ed. 580 (1948), and *Steele v. Louisville & N.R. Co.* 323 U. S. 192, 65 Sup. Ct. 226, 89 L.Ed. 173 (1945).

In *Seaboard,* an original action was brought by an interstate rail carrier in the state supreme court to enjoin the state Attorney General from attempting to collect statutory penalties or to enforce statutory provisions against it, on the ground that the carrier had been authorized by the Interstate Commerce Commission to own and operate a railway system without complying with the state laws involved. The state supreme court denied the request for the injunction and dismissed the complaint; the case was reversed on appeal to this Court with no jurisdictional problems. In *Steele,* this Court reviewed a decision on demurrer in a state trial court as to whether the Railway Labor Act imposes a duty upon a labor organization acting under a federal statute as an exclusive bargaining agent of a craft of employees to represent all the employees in the craft without racial discrimination.

Here the question is the construction of the Arizona Enabling Act, 36 Stat. 557, 568-579. There is no other way to bring the issue here. Moreover, it depends on no evidentiary facts—either a highway department can take school trust lands for its right-of-way and material site purposes without compensating the trust funds or it cannot. The matter is properly here.

CONCLUSION

The decision of the Arizona Supreme Court authorizing the Arizona State Highway Department to take trust lands for highway rights-of-way and material sites without compensation therefor is clearly wrong, as a matter of law. Trust lands held by the State of Arizona as well as the amici curiae herein were granted to the States for specific purposes. Any usage of these lands or the natural products thereof for other purposes is clearly a breach of the trust and should not be permitted by this Court. There is today in the Western States an ever-increasing demand by governmental and semi-governmental agencies for usage of trust lands. This decision opens the door for a complete destruction of the trust land theory set up under the state Enabling Acts by the Congress of the United States.

We therefore submit that the Petition for a Writ of Certiorari filed by the State of Arizona should be granted.

Respectfully submitted,

FORREST H. ANDERSON
Attorney General of
The State of Montana
Helena, Montana

CLARENCE A. H. MEYER
Attorney General of
The State of Nebraska
Lincoln, Nebraska

CHARLES NESBITT
Attorney General of
The State of Oklahoma
Oklahoma City, Oklahoma

PHIL L. HANSEN
Attorney General of
The State of Utah
Salt Lake City, Utah

BOSTON E. WITT
Attorney General of
The State of New Mexico
Santa Fe, New Mexico

HELGI JOHANNESON
Attorney General of
The State of North Dakota
Bismarck, North Dakota

FRANK FARRAR
Attorney General of
The State of South Dakota
Pierre, South Dakota

JOHN F. RAPER
Attorney General of
The State of Wyoming
Cheyenne, Wyoming

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